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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. NAASIR TALIBDEEN, Defendant and Appellant.	2d Crim. No. B206115 (Super. Ct. No. YA061032) (Los Angeles County)

Naasir Talibdeen appeals from an order revoking his probation and imposing an 11-year state prison sentence as a result of his earlier no contest plea to 4 counts of second degree commercial burglary (Pen. Code, § 459) and his admission that he had served 6 prior prison terms (§ 659, subd. (b)).[1] Appellant contends that although he was charged with both a new offense and a violation of his probation arising from the commission of that offense, his *Faretta*[2] waiver of counsel applied only to the trial on the new offense and not the probation revocation proceedings. He also claims the court abused its discretion in imposing the previously suspended 11-year sentence. We affirm.

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

FACTS AND PROCEDURAL HISTORY

The facts of the offenses are not relevant to the issues on appeal, so we need not discuss them in detail. On April 13, 2005, appellant was charged in case number YA061032 with four counts of commercial burglary. The information alleged that appellant committed burglary at a Subway restaurant on February 24, 2005, a Lucky Donuts shop on February 26, a Church's Chicken restaurant on February 28, and another Subway restaurant on that same date. It was also alleged that appellant had a prior strike conviction and had served eight prior prison terms (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d)).

On April 13, 2005, appellant waived his right to counsel following *Faretta* advisements and was granted self-representation. That same day, he pled not guilty and denied the prior allegations. On August 5, 2005, he withdrew his plea, entered a plea of no contest to four counts of second degree burglary, and admitted six of the prior prison term allegations. On April 4, 2006, the court sentenced him to a total term of 11 years in state prison. Execution of sentence was suspended and appellant was placed on five years formal probation with various terms and conditions, including (1) that he participate in an outpatient drug program; (2) that he refrain from possessing drugs or associated paraphernalia without a prescription; and (3) that he submit himself and his property to search or seizure at any time without probable cause or a warrant.

On May 24, 2006, probation was summarily revoked based on a new arrest for an unspecified charge. On June 8, appellant waived his right to a hearing and admitted the violation. On September 18, 2006, probation was reinstated and modified to order that appellant serve 180 days in county jail and 6 months in a sober living program.

On October 11, 2006, appellant was arrested for possession of a controlled substance. He was subsequently charged in case number PA057499 with a violation of Health and Safety Code section 11350, subdivision (a). The new case included the same strike and prior prison term allegations that were alleged in case number YA061032.

On October 23, 2006, appellant waived his right to counsel in accordance with *Faretta* and proceeded as his own attorney. Following the preliminary hearing, he was held to answer.

On November 15, 2006, appellant's probation in case number YA061032 was again summarily revoked. On December 18, 2006, he appeared on his own behalf for the setting of the revocation hearing. The matter was transferred from the Southwest courthouse in Torrance to the San Fernando courthouse, where the new case was being heard. On December 28, 2006, the probation revocation hearing was ordered to trail the new case.

On March 28, 2007, appellant appeared at a hearing in which the new case and the probation revocation were both called. After the court provided *Faretta* advisements, appellant expressed his desire to represent himself and waived his right to counsel. Appellant then entered a plea of not guilty in the new case and denied the special allegations.

On May 11, 2008, the prosecution informed the court of its intent to proceed with the probation revocation first. Appellant's motions to reinstate probation and withdraw his plea in case number YA061032 were subsequently denied.

The probation revocation hearing was held on January 4, 2008. Evidence at the hearing established that around 2:15 a.m., on October 11, 2006, appellant was pulled over while driving a vehicle with one of its tail lights out. During a probation search, two rocks of cocaine base and a smoking pipe were recovered from under the driver's seat. Appellant testified that the drugs were placed there by a woman he had given a ride from the sober living home where he was staying.

At the conclusion of the hearing, the court found appellant in violation of his probation, and probation remained revoked. The court thereafter imposed the previously suspended sentence of 11 years in state prison.

DISCUSSION

I.

Faretta

Appellant contends the court violated his right to counsel by allowing him to represent himself in the probation revocation proceedings. Appellant's claim is premised on the proposition that new *Faretta* advisements and a waiver of the right to counsel are required when a defendant who represented himself in a criminal proceeding is subsequently charged with violating probation. (See *People v. Hall* (1990) 218 Cal.App.3d 1102, 1108-1109 (*Hall*).) While he acknowledges that he effectively waived his right to representation in the new case charging him with possessing a controlled substance, he claims the waiver did not apply to the probation revocation proceedings that were based on his commission of the same offense. We disagree.

A criminal defendant has the constitutional right to be represented by counsel at all critical stages of a criminal prosecution, yet also has the right "to proceed without counsel when he voluntarily and intelligently elects to do so." (*Faretta*, *supra*, 422 U.S. at p. 807.) "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver. [Citation.]" (*People v. Dunkle* (2005) 36 Cal.4th 861, 908, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The requirements for a valid waiver "are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069-1070.)

"'When confronted with a request' for self-representation, 'a trial court must make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 932; see also *People*

v. Sullivan (2007) 151 Cal.App.4th 524, 545 (*Sullivan*).) "'No particular form of words, however, is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation. "'The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.'" [Citations.]' [Citation.] If the trial court's warnings communicate powerfully to the defendant the 'disadvantages of proceeding pro se,' that is all '*Faretta* requires.' [Citation.] . . . The 'information a defendant must have to waive counsel intelligently will "depend, in each case, upon the particular facts and circumstances surrounding that case" [citation].' [Citation.]" (*Sullivan, supra,* at p. 546.)

A defendant challenging the trial court's decision to grant a request for self-representation bears the burden of showing that he or she did not knowingly and intelligently waive the right to counsel. (*Sullivan, supra,* 151 Cal.App.4th at p. 547.) Whether such a waiver has occurred is a question of fact. (*Ibid.*) On appeal, we "'review the entire record-including proceedings after the purported invocation of the right of self-representation-and determine de novo whether the defendant's invocation was knowing and voluntary. [Citations.] Even when the trial court has failed to conduct full and complete inquiry regarding a defendant's assertion of the right of self-representation, [we] examine the entire record to determine whether the invocation of the right of self-representation and waiver of the right to counsel was knowing and voluntary.' [Citations.]" (*Ibid.*)

We conclude the record, viewed as a whole, establishes that appellant knowingly, voluntarily and intelligently waived his right to be represented in both the probation revocation proceedings and the new case. Immediately prior to addressing appellant's request for self-representation at the March 28, 2007 hearing, the court read both case numbers and expressly referred to both the new case and the probation revocation. Although the court did not identify any unique challenges appellant might face in a probation revocation hearing, as opposed to a criminal trial, the court's

comments and the waiver form appellant executed provided warnings about the hazards of self-representation that apply to all criminal matters.[3]

Moreover, this is not one of those probation revocation matters in which "the point when the violation occurs is . . . a matter of technical judgment," or the violation is "of such little consequence that a probationer may not even be aware of his transgression." (See *People v. Vickers* (1972) 8 Cal.3d 451, 461.) The record reflects appellant's understanding that the probation revocation and the new case were simply different ways to litigate the same issue, i.e., whether he was guilty of possessing the cocaine base found under the driver's seat of his vehicle. For example, in announcing her intent to proceed with the probation revocation first, the prosecutor explained: "We just want to set it for the probation violation hearing, and either he will be violated and that will take care of the new case, or he won't be violated and that will also probably take care of the new case. . . . [¶] So either way, it should resolve the case." Appellant responded: "According to the record, the violation would only be the new case. The other courts . . . took note of that."

At the beginning of the probation revocation hearing, appellant reiterated his understanding that "the only evidence to pursue the probation violation is the open case." Appellant was also privy to the prosecutor's remark that "if he's not violated, then we can't make the burden of proof on a probation violation and chances are we can't make it on a trial." Moreover, he did not object or express any confusion when the court

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[3] The court warned appellant: "Even if you were an attorney, I think there are definite risks in representing yourself, because if you are representing yourself you are so emotionally involved in what is going on that sometimes you fail to recognize objectively the situation and you may not be making decisions based on common sense, but more on emotion. [¶] . . . [¶] Sir, with all [your] state prison priors . . ., you face [a] lot of years in state prison. It may not be in your best interest to represent yourself. You will be going against a very experienced district attorney. [¶] . . . [¶] The bottom line is law is complicated . . . ." At the conclusion of the hearing, the court revisited the issue and told appellant: "[S]ir, think about what I said about representing yourself. I recognize that you're an intelligent man. I recognize that, but even if I were charged or my husband were charged, we would not represent ourselves, okay? [¶] . . . [¶] Think about that. . . ."

announced that he had been found in violation of his probation by clear and convincing evidence instead of beyond a reasonable doubt. The interrelated nature of the two proceedings was also apparent at sentencing, when the court offered to reinstate probation if appellant pled to the possession charge with a six-year prison term. At no time did appellant express or allude to any belief that he was entitled to representation in the new case but not the probation revocation, nor did he ever indicate that he had not intended to represent himself throughout both proceedings. (*Sullivan, supra*, 151 Cal.App.4th at p. 552.) Under the circumstances, we find no merit in appellant's claim that he intended to waive his right to counsel in the new case but not the probation revocation.

II.

Imposition of Sentence

Appellant argues that the court abused its discretion in imposing the previously suspended 11-year prison sentence. He contends that probation was warranted because his new offense did not involve violence, injury, or loss to any victims, and therefore continuing probation would not have posed a risk to public safety. He also believes the court's decision "appears to have been based on unsubstantiated evidence of drug addiction" as well as the court's "irritation" with appellant during the sentencing hearing. These claims lack merit.

"Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. 'A denial or grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

The court did not abuse its discretion in refusing to continue appellant on probation. He violated his probation for the first time less than two months after sentencing. Less than a month after probation was reinstated, he was again arrested. Moreover, appellant was not found to have violated some minor or technical condition of his probation. On the contrary, he committed a new criminal offense that exposed him to a lengthy prison sentence even without the probation violation. On these facts, it would have been within the court's discretion to simply terminate probation and impose the previously suspended 11-year sentence without any further consideration.

The court, however, offered to reinstate probation if appellant agreed to enter an open plea to the possession charge with a six-year sentence. Instead of accepting this offer, appellant sought to revive prior offers that had long since expired, requested a prison placement for which he was ineligible, then insisted on preserving his right to appeal his section 995 and 1538.5 motions. After it became clear that appellant was "playing games," the court proceeded to terminate probation and impose the previously suspended sentence. When appellant objected, the court asked him "for the sixth time" whether he wanted to accept the offer. He responded by reiterating his desire to reserve his appeal rights. What appellant labels as "irritation" is actually the court's justifiable frustration over appellant's apparent inability to accept such a generous offer.

We also reject appellant's claim that his drug problem is "unsubstantiated." Appellant has a prior felony conviction for possessing a controlled substance, in addition to the current offense. The probation report also states that appellant "has a lengthy history" of substance abuse addiction. The fact that appellant was ordered to live in a sober living home as a condition of his probation indicates that his prior violation was also drug related.

For the first time in his reply brief, appellant contends that "the court failed to consider appellant request for reinstatement of probation" because the court gave him an "ultimatum" to "either plead no contest on the new case, or face sentence on the probation violation case . . . ." Because this argument was not raised in the opening brief,

it has been forfeited. In any event, the record plainly reflects the court's understanding that it had the discretion to reinstate probation without regard to the new case.

The judgment (order revoking probation) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Shari K. Silver, Judge

Superior Court County of Los Angeles

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